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February 27, 2007

VIA ELECTRONIC FILING

The Honorable Mary Pat Thyng
United States District Court
844 North King Street
Wilmington, Delaware 19801

Re: *Sepracor, Inc. v. Dey, L.P. and Dey, Inc.*
C.A. No. 06-CV-113-*** (MPT); (Consolidated)

Dear Judge Thyng:

We write in response to Sepracor's letter to the Court dated February 26, 2007 (D.I. 109).

This Court should not be fooled; Sepracor's February 26th letter is nothing more than an unfortunate—and fairly transparent—attempt by Sepracor to deflect the Court's attention away from its own failure to comply with its discovery obligations by manufacturing a "discovery dispute" of its own in time for tomorrow's teleconference.

Your Honor may recall that during the February 21st status teleconference, it was counsel for Dey who asked the Court for permission to raise a couple of discrete discovery issues during tomorrow's follow-up teleconference, while counsel for Sepracor made no mention of any ripe discovery issues and referred only to its response. *See* Ex. A at page 8, line 12 to page 10, line 3. Dey's request to be heard was necessitated by Sepracor's failure to produce certain documents and interrogatory responses that Judge Jordan had ordered Sepracor to produce "forthwith" last November (*see* Ex. B at p. 13, lines 11-20, and p. 21, lines 8-21). Predictably, after Your Honor agreed that Dey could present its issues during tomorrow's teleconference, Sepracor relented and agreed to produce the documents and interrogatory responses that Judge Jordan had ordered it to produce three months ago, leaving a single e-discovery issue on the table.

Sepracor, however, apparently was not content to "play defense," and made the strategic decision to go on the offensive. On February 22, 2007 at 8:15 p.m., Sepracor's counsel emailed to Dey's counsel a five-page letter rehashing an "everything but the kitchen sink" list of complaints about Dey's document production, and demanding to meet and confer on these issues the next day. Although Dey's counsel was surprised by Sepracor's demand (since the parties had previously agreed to table Sepracor's complaints while their e-discovery issues were being worked out), she responded with a letter on February 23rd agreeing to review the issues raised by Sepracor and respond by March 9. *See* Ex. C. Then, in a telephone conference among counsel for the parties yesterday, Dey reconfirmed that it would provide substantive answers to the issues raised in Sepracor's February 22nd letter on or before March 9.

The Honorable Mary Pat Thyng
February 27, 2007
Page 2

Thus, the only “relief” requested by Sepracor, “an order requiring Dey’s counsel to meet and confer by a date certain either on or before March 9, 2007,” is unnecessary because Dey voluntarily agreed (both orally and in writing) to do so, even before Sepracor made that request. Accordingly, Dey respectfully requests that the Court deny it.

Respectfully,

/s/ John G. Day

John G. Day (I.D. #2403)

JGD: nml
178237.1

cc: Richard D. Kirk, Esquire (by hand delivery)
Jack M. Stover, Esquire (via electronic mail)
Todd R. Walters, Esquire (via electronic mail)

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF DELAWARE

SEPRACOR, INC.,

Plaintiff,

v

DEY, L.P. and DEY, INC.,

Defendants.

: CIVIL ACTION
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: NO. 06-113 (***)

Wilmington, Delaware
Wednesday, February 21, 2007 at 2:01 p.m.
TELEPHONE CONFERENCE

BEFORE: HONORABLE **MARY PAT THYNGE**, U.S. MAGISTRATE JUDGE

APPEARANCES:

THE BAYARD FIRM
BY: ASHLEY B. STITZER, ESQ.

and

BUCHANAN INGERSOLL & ROONEY, PC
BY: WILLIAM E. DAVIS, ESQ.
(Miami, Florida)

and

BUCHANAN INGERSOLL & ROONEY, PC
BY: SUSAN M. DADIO, ESQ., and
BARBARA WEBB WALKER, Ph.D., ESQ.
(Alexandria, Virginia)

and

Brian P. Gaffigan
Registered Merit Reporter

1 Honor, so I could take the lead.

2 THE COURT: Okay. And then I will look at this
3 as a status/scheduling conference, possibly. And it may
4 still be a scheduling conference in any event because I'm
5 not certain what is going to happen with this scheduling
6 order. I did cancel the tutorial I know in this case but
7 it was because of the timing of it. I don't know, if you
8 don't consent to my jurisdiction, whether you do want to
9 still do some type of tutorial with me so I'm familiar with
10 the technology because there may be discovery disputes
11 related to it. I throw that out there. I'm not suggesting
12 you have to do it. I'm just throwing that out there because
13 it's one issue that has been raised to me a couple times.
14 So let's talk then on Wednesday, February 28th and we'll
15 talk about what parties have decided concerning consenting
16 and then also talk about the scheduling order.

17 MS. LEFF: Your Honor, this is Elizabeth Leff on
18 behalf of Dey. There are some discovery issues that we
19 believe are ripe for the Court to look at. Should we wait
20 to raise those with you on the 28th, depending on what
21 happens, or can we begin that process now?

22 THE COURT: Well, I know that there is a motion
23 to strike out there for allegations relating to willful
24 infringement which would be something I couldn't decide.
25 And there has been nothing else filed as far as I know to

1 date. Have the parties conferred?

2 MS. LEFF: Yes, the parties have conferred.

3 THE COURT: Then we might as well take up some
4 of the discovery issues at that time, too. We'll follow the
5 schedule that Judge Jordan presently has in place which I
6 understand I think it's 48 hours before the scheduled date,
7 one side is to provide what their issues are and the other
8 side has, after that, 24 hours before that time to respond;
9 right?

10 MS. LEFF: That's correct.

11 MR. DAVIS: That's correct, Your Honor.

12 THE COURT: Let me just look and make sure
13 that -- I think he is more generous than I am.

14 (Pause.)

15 THE COURT: He is. Understand that I want the
16 font to be a 12 point font. I don't want it to be 10, I
17 don't want it to be something I have to squint at with my
18 glasses. And that's fine. That's fine. We can take up the
19 discovery matters then, too.

20 MS. LEFF: So the opening brief would or letter
21 would be due on the 26th?

22 THE COURT: Yes, it would, but don't file it
23 after 5:00 o'clock, please.

24 MS. LEFF: Okay.

25 THE COURT: The same thing with regard to the

1 responsive one, don't file it after 5:00 o'clock Eastern
2 time.

3 MR. DAVIS: We won't do that.

4 THE COURT: All right. And we'll talk then at
5 3:00 o'clock on Wednesday, February 28th.

6 John, would you please prepare an order for
7 my signature indicating that we're going to have a
8 status/scheduling conference as well as discovery dispute
9 and handling any discovery disputes at that time?

10 MR. DAY: I'd be happy to, Your Honor.

11 THE COURT: Okay. Thank you.

12 MR. DAY: Okay. Good-bye.

13 (The attorneys respond, "Thank you, Your
14 Honor.")

15 THE COURT: Okay. Thank you. Good-bye.

16 (Telephone conference ends at 2:12 p.m.)
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EXHIBIT B

1 IN THE UNITED STATES DISTRICT COURT

2 IN AND FOR THE DISTRICT OF DELAWARE

3 SEPRACOR, INC.,

4 Plaintiff,

5 v

6 DEY, L.P. and DEY, INC.,

7 Defendants.

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: CIVIL ACTION

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: NO. 06-113 (KAJ)

- - -

9 Wilmington, Delaware

10 Wednesday, November 1, 2006 at 4:00 p.m.

11 TELEPHONE CONFERENCE

- - -

12 BEFORE: HONORABLE **KENT A. JORDAN**, U.S.D.C.J.

- - -

13 APPEARANCES:

14 THE BAYARD FIRM

15 BY: RICHARD D. KIRK, ESQ.

16 and

17 BUCHANAN INGERSOLL & ROONEY, PC

18 BY: SUSAN M. DADIO, ESQ.

19 (Alexandria, Virginia)

20 and

21 BUCHANAN INGERSOLL & ROONEY, PC

22 BY: JAYSON R. WOLFGANG, ESQ.

(Harrisburg, Pennsylvania)

23 Counsel for Plaintiff

24 Brian P. Gaffigan

25 Registered Merit Reporter

1 here.

2 I'm not telling you that I'm granting them some
3 kind of relief because frankly I don't understand them to
4 be saying as to document production, we want some relief.
5 I understand them to be saying, judge, we're worried.
6 And based on what I'm hearing and what I've read, I think
7 they've got reason to be worried. So if we come off the
8 track, at least at this point, you're going to look like
9 the folks who put the rock on the tracks and caused things
10 to come off, and that's not going to be good for anybody.

11 So my strong urging to you is on this document
12 production, if you don't have somebody going through
13 inventor notebooks already, you better get somebody going
14 through inventor notebooks. If you want to do a rolling
15 production, fine. You better start rolling out some
16 inventor notebooks and some things that aren't FDA
17 regulatory material. That is something that occurs to me,
18 in a big ticket patent case with plenty of lawyers on both
19 sides, could have happened sooner than three months after
20 the requests were served.

21 So that takes care of the documents. And I
22 presume I'm being clear enough that we're going to have
23 responses that include something besides regulatory
24 documents going over in the very near future. Okay,
25 Mr. Walters?

1 take it as a given now that they want you to use whatever
2 information is in your possession or at your disposal to
3 explain to them your good faith basis for asserting that
4 they are infringers by virtue of the filing of their ANDA.
5 So I'm expecting you to give them a response that is full as
6 you can make it and in good faith and that ought to be done
7 forthwith. So let's get it done; all right?

8 MS. LEFF: Your Honor, can I ask that they
9 respond to the rest of the interrogatories pursuant to my
10 letter to Ms. Dadio of the 26th?

11 THE COURT: Well, I think I have given you all
12 enough instruction here for you to work out what you need
13 to work out, okay? If I have to get into it on an
14 interrogatory-by-interrogatory basis, I'll do it, but I can
15 promise if I'm put in that position, the party that I think
16 put me in that position by acting in less than full good
17 faith will pay some sort of freight for it, and I just
18 don't expect that that is going to happen. I expect parties
19 to behave in a way that is sensible and not standing on
20 technical points that really don't have a foundation when
21 examined closely.

22 So anyway, I think I have said enough in this
23 call to get people, I hope, operating on the same page. But
24 I'll give you like 30 seconds a piece to tell me if there
25 is something ambiguous about what I tried to communicate.

EXHIBIT C



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February 23, 2007

Elizabeth A. Leff
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VIA E-MAIL

Barbara Webb Walker, Esq.
Buchanan Ingersoll & Rooney PC
1737 King Street, Suite 500
Alexandria, VA 22314-2727

Re: Sepracor Inc. v. Dey, L.P. and Dey, Inc.

Dear Barbara:

This morning I received the five page letter you sent by e-mail last night at 8:15 p.m. We will carefully review and consider the issues you raise and will respond as soon as we have completed our review. We expect to respond by March 9, 2007. If appropriate, Dey will make every effort to supplement its responses.

However, as we received your lengthy letter this morning, we will not be prepared to discuss the issues it raises at the 1 p.m. meet and confer teleconference. Moreover, we do believe those issues are ripe for consideration by the Court because the requirements of Local Rule 7.1 have not been met. As you will recall, when I raised the issue of discovery matters which could not be resolved by the parties, Magistrate Judge Thyne asked if the parties had conferred. I stated we had. The issues Dey intends to raise on February 28 are issues that the parties have discussed several times and have been unable to resolve.

Very truly yours,

A handwritten signature in black ink, appearing to be 'Elizabeth A. Leff', written over the typed name.

Elizabeth A. Leff

EAL/yhw